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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

GERALD WILSON,

Defendant and Appellant.

D074626

(Super. Ct. No. JCF000712)

APPEAL from a judgment of the Superior Court of Imperial County,
Christopher J. Plourd, Judge. Affirmed.

David W. Beaudreau, under appointment by the Court of Appeal, for Defendant
and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Michael Pulos, Seth M. Friedman
and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Gerald Wilson of battery on a nonconfined person by a prisoner (Pen. Code,¹ § 4501.5; count 1). In a bifurcated proceeding, the court found Wilson suffered a prior strike conviction (§§ 667, subd. (b)–(i), 1170.12, subd. (a)–(d)). However, the court struck the prior conviction for purposes of sentencing after considering the factors in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The court sentenced Wilson to the middle term of three years in prison to run consecutively to the prison term he was currently serving. The court imposed mandatory fees and minimum restitution fines.

Wilson contends on appeal there was insufficient evidence to support his conviction because the prosecution did not present evidence his prison confinement "was supported by an order made pursuant to law" and the court committed instructional error when it omitted from standard jury instruction CALCRIM No. 2723's definition of a person as "serving a sentence in a state prison" the requirement that the individual was confined "by an order made according to law." We conclude there was substantial evidence to support the conviction and any instructional error was harmless. We, therefore, affirm the judgment.

¹ Statutory references are to the Penal Code unless otherwise stated.

BACKGROUND

The People presented evidence from a correctional officer that Wilson was an inmate at Calipatria State Prison. The officer knew Wilson was "in the CDCR system"² and wore "State blues," referring to the prison uniform. The officer, as an employee of the prison, was not an inmate.

On the morning of January 27, 2016, the officer was providing security as a sergeant conducted a search of another inmate when Wilson approached the officer from behind. The officer advised Wilson he was out of bounds and directed him to return to his facility. Wilson refused to move away and became belligerent and verbally abusive. The sergeant came out and applied handcuffs to Wilson. Within seconds, however, an alarm sounded in another building and the officer providing security left to respond. The officer did not know what happened to Wilson.

Later that day, the officer saw Wilson enter the dining hall. When Wilson exited the dining hall, Wilson came toward the officer, looked at him, and began to mumble. The officer could not understand what Wilson was saying. The officer ordered Wilson to keep walking back to his building. When Wilson continued to mumble, the officer gave him another order to move. Wilson lunged at the officer and struck the left side of the officer's face with his fist. Another officer grabbed Wilson by the chest, moved Wilson toward the wall, used a leg to sweep Wilson off his feet, and brought Wilson to the

² The California Department of Corrections and Rehabilitation is referred to as the CDCR.

ground. The first officer went to the ground and put his knee on Wilson's body to control him. Wilson kicked and flailed despite orders to comply and be handcuffed. The officers eventually secured Wilson's hands and placed Wilson in restraints.

The first officer sustained injuries to the left lower side of his mouth, his right small finger, and his right hip. He also had a mild concussion. His hip required surgical repair and he wore a finger splint for four months. The officer missed work due to his injuries.

DISCUSSION

I

Wilson contends there was insufficient evidence to support his conviction for battery by a prisoner under sections 4501.5 and 4504, subdivision (a) because the People did not present evidence of the actual order confining Wilson to prison. We disagree.

In evaluating a challenge to the sufficiency of the evidence supporting a conviction, we " ' ' ' must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " ' [Citation.] ... 'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence.' " (*People v. Brooks* (2017) 3 Cal.5th 1, 57.) We presume the existence of every fact the trier of fact could reasonably deduce from the evidence in support of the judgment. (*People v. Clark* (2011) 52 Cal.4th 856, 943.)

Section 4501.5 provides: "Every person confined in a state prison of this state who commits a battery upon the person of any individual who is not himself a person confined therein shall be guilty of a felony and shall be imprisoned in the state prison for two, three, or four years, to be served consecutively."

Section 4504, subdivision (a) states in pertinent part: "A person is deemed confined in a 'state prison' if he or she is confined in any of the prisons and institutions specified in Section 5003 by order made pursuant to law, including, but not limited to, commitments to the Department of Corrections and Rehabilitation ..., regardless of the purpose of the confinement and regardless of the validity of the order directing the confinement, until a judgment of a competent court setting aside the order becomes final."

The People presented evidence from the correctional officers that Wilson was an inmate in the Calipatria State Prison, a state prison in Imperial County, he was in the CDCR system, he wore a prison uniform, and he had been in the prison yard for quite some time.

Wilson, who represented himself at trial, did not dispute he was a person confined in state prison for purposes of section 4501.5. Therefore, section 4504, subdivision (a), defining when a person is deemed "confined in 'state prison' " was not applicable and evidence of the actual order confining Wilson to prison was not necessary.

Wilson admitted in discussions with the court and the prosecutor that he was previously convicted and was serving time in prison at the time of the incident. He admitted to the court he had "a long file" and had "36 years in the institution." The

prosecutor described for the court numerous felony convictions dating back to 1982, which Wilson did not dispute. Wilson chose not to testify because he did not want the jury to be influenced by his history, which included not only his prior convictions, but prior assaults against prison staff members when he was a young man.

In closing statements to the jury, Wilson conceded he was in prison and the officer was not. He stated those elements of the crime were proven. Wilson instead argued the People did not prove the element of intent.

"It is well settled that '[a]n admission of a fact made at the trial in open [c]ourt by the prisoner or his counsel may be properly considered by the jury.' " (*People v. Peters* (1950) 96 Cal.App.2d 671, 677, quoting *People v. Garcia* (1864) 25 Cal. 531, 534–535; see *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 48 ["A judicial admission is a party's unequivocal concession of the truth of a matter, and removes the matter as an issue in the case"].) Therefore, there was substantial evidence Wilson was confined in state prison for purposes of his conviction under section 4501.5.

II

Wilson also contends the court erred by omitting language from the pattern jury instruction regarding the requirement that confinement to prison be made pursuant to an order made according to law.

After listing the elements of the crime for battery by a prisoner on a nonprisoner, pattern CALCRIM No. 2723 defines "serving a sentence in state prison" in pertinent part as follows: "A person is *serving a sentence in a state prison* if he or she is (confined in _____<insert name of institution from Pen. Code, § 5003>...) by an order

made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *serving a sentence in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is not *serving a sentence in a state prison*.]" (2 CALCRIM No. 2723 (2019).) The Bench Notes instruct the court to "give the bracketed portion that begins with 'regardless of the purpose,' or the bracketed second or third sentence, if requested and relevant based on the evidence." (*Ibid.*)

The court here instructed the jury with CALCRIM No. 2723 with the following definition of the term: "*A person is serving a sentence in a state prison* if he is confined in Calipatria State Prison." This definition omitted the language "by an order made according to law" as well as the first bracketed portion beginning with the phrase "regardless of the purpose." Neither Wilson nor the prosecutor objected to the court's instruction.

Although a defendant is constitutionally entitled to have the jury instructed on the essential elements of a charged offense (*People v. Merritt* (2017) 2 Cal.5th 819, 824), the instructional error here was harmless considering Wilson's concession of the issue of his confinement. In the court's discussion of the jury instructions, the court and Wilson agreed a lesser included offense of simple battery would not be appropriate because there

was no dispute Wilson was a prisoner in custody at the time of the incident. Wilson's concession of the fact of his confinement made it unnecessary for the jury to consider evidence of the order committing him to the CDCR. "[I]nstructional error is harmless 'where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence.' " (*People v. Mil* (2012) 53 Cal.4th 400, 417; *Merritt*, at p. 831 [" 'One situation in which instructional error removing an element of the crime from the jury's consideration has been deemed harmless is where the defendant concedes or admits that element' "].)

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

AARON, J.